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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-74

PIPEFITTERS LOCAL UNION NO. 562, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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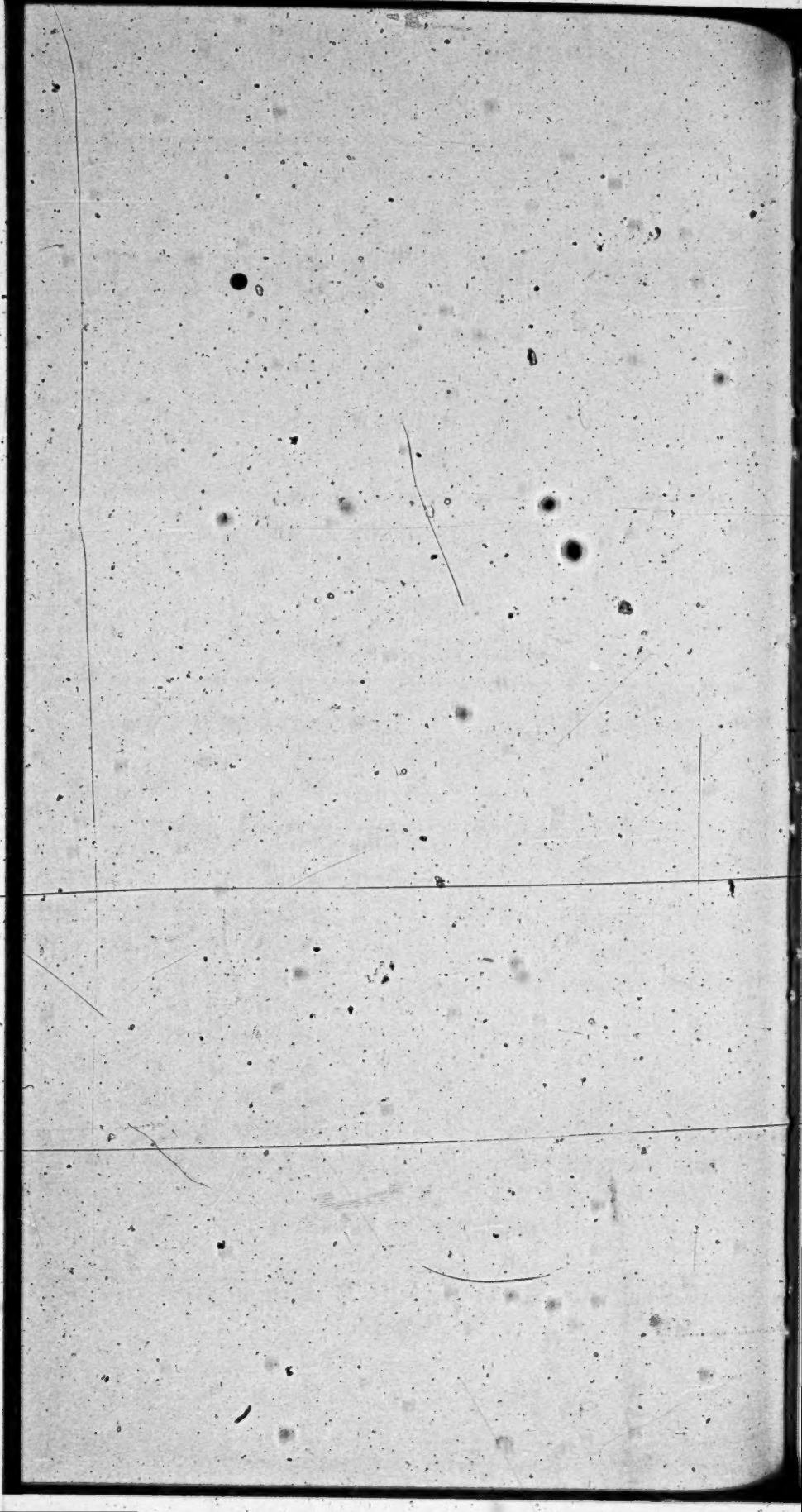

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Since the inception of the case at bar, petitioners have always maintained that to sustain a conviction for violation of 18 U.S.C., § 610 with respect to the Pipefitters' Voluntary Fund, required proof that contributions to the Fund were made involuntarily. See A. 27-28, 30, 32, 34-44; Motion Tr. 27-29; A. 1092-93, 1095, 1121-25; Pet. Br. 52-54, 70-71.[1]

[1] "A." references are to the Appendix filed herein in two volumes; "Motion Tr." references are to the transcript of proceedings in the district court had on hearings of various motions on August 9, 1968; "Pet. Br." references are to the original brief on the merits filed herein by petitioners, and "Gov. Br." references are to the original brief on the merits filed herein by the government.

Inasmuch as the Voluntary Fund was actually segregated from the dues and assessments of the union; was not considered by the members as part of the general treasury of the union, and was not contributed to by all of the members of the union, it was petitioners' position that the only conceivable way the Voluntary Fund could be considered as dues or assessments of the union itself, rather than a separate fund, was if the members did not voluntarily contribute to the Fund.

By its enactment of § 205 of Public Law 92-225 (Federal Election Campaign Act of 1970), Congress clearly confirmed that meaning of 18 U.S.C., § 610, which petitioners have consistently urged throughout the course of these proceedings.[2] Congress' purpose in enacting § 205 was not to change 18 U.S.C., § 610, but rather to codify and put in more precise language the prohibitions of § 610 as it existed. This is patently obvious from the legislative history with respect to § 205. As Representative Hansen, the sponsor of the legislation, stated at the outset of the floor debate on the conference committee report:

> "Second, I will repeat what I stated several times during the course of the debate that the purpose and

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[2] In pertinent part, § 205 of Public Law 92-225, states as follows:

> "As used in this section, the phrase 'contribution or expenditure' . . . . shall not include . . . the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: Provided, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

Section 205 insofar as pertinent to the instant case, is identical with § 305 of H.R. 11060, 92d Cong., 1st Sess. (1971), which

effect of my amendment is to codify and clarify the existing law and not to make any substantive changes in the law." 118 Cong. Rec. 94 (daily ed. Jan 19, 1972).

Thereafter, Representative Hays of Ohio stated:

> "I will say to the gentlemen [Rep. Hansen] that what he is saying will be legitimate legislative history and that what somebody down in the Department of Justice, some Assistant Attorney General's opinion, is worth exactly as much as the piece of paper it is printed on, no more and no less." *Ibid.*

Thus, although not altering any of the attributes of permissible union political organizations, § 205 does effect a substantive change in 18 U.S.C. § 610, as prosecuted by the government and as construed and applied by the lower courts. Congress, in codifying and clarifying the law existing at the time of the instant prosecution, pronounced positively that for all time, petitioners always had the right to make political contributions in the manner for which they were prosecuted and convicted.

Accordingly, the instant case must be reversed under that line of cases which hold that the repeal of a criminal

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is the amendment to the original bill offered by Representative Hansen of Idaho.

Prior to the Hansen Amendment, there was an amendment to H.R. 11060 offered by Representative Crane of Illinois, which likewise gave 18 U.S.C. § 610, the same meaning as petitioners have strenuously urged. The Crane Amendment in pertinent part was as follows:

> "Nothing in this section shall preclude an organization from establishing and administering a separate contributory fund for any political purpose, including voter registration or get-out-the-vote drives, if all contributions, gifts, or payments to such fund are made freely and voluntary, and are unrelated to dues, fees, or other moneys required as a condition of membership in such organization or as a condition of employment."

statute or the enactment of a statute by Congress, which substitutes a right where previously it was a crime, abates the prosecution. See e.g. **United States v. Schooner Peggy**, 1 Cranch 103, 110, 2 L.Ed. 49 (1801); **Yeaton v. United States**, 5 Cranch 281, 283, 3 L. Ed. 101 (1809); **Maryland for Use of Washington County v. Baltimore & O.R. Co.**, 3 How. 534, 552, 11 L. Ed. 714 (1845); **Norris v. Crocker**, 13 How. 429, 438, 14 L. Ed. 210 (1851); **United States v. Tynen**, 11 Wall. 88, 95, 20 L. Ed. 153 (1871); **United States v. Reisinger**, 128 U.S. 398, 401, 9 S. Ct. 99, 32 L. Ed. 480 (1888); **United States v. Chambers**, 291 U.S. 217, 222-23, 54 S. Ct. 434, 435, 78 L. Ed. 763 (1934); **Massey v. United States**, 291 U.S. 608, 54 S. Ct. 534, 78 L. Ed. 1019 (1934); **Hamm v. Rock Hill**, 379 U.S. 307, 312-15, 85 S. Ct. 384, 389-91, 13 L. Ed. 2d 300 (1964). These cases, which upheld the doctrine of abatement,[3] involved either the repeal of a statute or the enactment of a new statute making conduct noncriminal, which conduct was proscribed by another

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[3] The doctrine of abatement is well established in American jurisprudence, originating in English common law. See, e.g. **Rex v. Cator**, 4 Burr. 2026, 98 Eng. Rep. 56 (1767); **King v. Davis**, 1 Leach 271, 168 Eng. Rep. 238 (1783). The doctrine can be traced in this country to **United States v. Schooner Peggy**, *supra*;

In 1871, Congress to avoid the effect of this doctrine enacted a federal saving statute (16 Stat. 432), which in its present form (61 Stat. 635, 1 U.S.C. § 109) provides as follows:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

criminal statute. Here, however, Congress has gone further than merely failing to vivify or enliven 18 U.S.C. § 610, as prosecuted by the government and construed and applied by the lower courts; nor for that matter has Congress merely substituted a right for a crime. Rather, Congress re-affirmed that even prior to the enactment of § 205, petitioners' conduct was lawful.

The federal saving statute, 1 U.S.C. § 109, therefore, is totally inapposite to the case at bar. This Court, in **Hamm v. Rock Hill,** *supra* at 379 U.S. 314, 85 S. Ct. 390, stated that the federal savings statute "was meant to obviate mere technical abatement such as that illustrated by the application of the rule in Tynen decided in 1871." In **United States v. Tynen,** *supra*, a substitution of a new statute with greater penalties was held to abate a previous prosecution.

Section 205 of the Federal Election Campaign Act of 1971 is not a technical abatement of the instant prosecution, as that in **Tynen.** Section 205 is well beyond the narrow language of amendment and repeal, so that the federal saving statute can in no way nullify abatement of the instant case.

This is so, despite the protestation at page 2 of the Memorandum for United States that Representative Hansen stated on the floor of the House that "[t]he Hansen amendment is completely consistent with the basic theory of the government's prosecution" in this case. What the government has failed to quote to the Court, however, are the remarks of Representative Hansen immediately preceding that statement quoted by the government, which forms the basis for the quoted statement as follows:

> "With respect to the Pipefitters' case, the thrust of the prosecutions there, as is evident from the government's briefs, is that section 610 was violated

> because the Pipefitters' Political Action Fund utilized **assessments whose payment was required as a condition of employment.** That precise evil is covered in explicit terms in the Hansen amendment." (Emphasis supplied.) 118 Cong. Rec. 95 (daily ed. Jan. 19, 1972).

Petitioners fail to find anything in the indictment which even remotely resembles an allegation that contributions to the Pipefitters' Voluntary Fund were "assessments whose payment was required as a condition of employment."

Moreover, nothing contained in the indictment approaches a charge that petitioners conspired to violate 18 U.S.C., § 610, by reason of doing any of the other things which would make contributions to federal candidates by the Pipefitters' Voluntary Fund unlawful under the proviso of § 205; namely, "utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization . . ., or by monies obtained in any commercial transaction." To the contrary, the government throughout the trial strenuously argued that it is not necessary for a violation of 18 U.S.C., § 610 to prove involuntariness on the part of contribtuors to the Fund (A. 56-57; Motion Tr. 35-36; A. 1093). As such, the instant prosecution, having been based on an indictment which has always been inconsistent with the prohibitions of 18 U.S.C., § 610, by virtue of § 205, must be abated and the convictions reversed.

Additionally, no evidence introduced by the government would require a different result. Certainly, at least with respect to the lone remaining individual petitioner, George Seaton, the evidence as to his participation in an

alleged conspiracy to establish and maintain the Pipefitters' Voluntary Fund contrary to 18 U.S.C., § 610 is practically non-existant. In fact, the testimony of most of the government's own witnesses, as we have previously detailed in our original brief, evidences that payments to the Pipefitters' Voluntary Fund were completely voluntary, without ever the slightest element of coercion. See Pet. Br. 29-36. Likewise, the defense evidence overwhelmingly demonstrates the lack of compulsion on contributors to the Fund, so much so that out of seventy-seven persons testifying on behalf of the petitioners, who were either members of Local 562 or worked under the jurisdiction of Local 562, thirty-two of them testified they either did not contribute to the Voluntary Fund, had never contributed, or did not contribute regularly under the formula voted on by the contributors. See Pet. Br. 36-38 for a detailed statement of defense evidence. We submit, therefore, that the evidence having failed to show any semblance of involuntariness or compulsion on the contribtuors to the Voluntary Fund, requires an abatement of the instant prosecution, in light of § 205.

In any event, at the very least, the enactment of § 205, requires that the case at bar be remanded to the district court for a new trial.

In view of the recent enactment, the instant case was submitted to the jury exactly opposite to Congress' interpretation of 18 U.S.C. § 610. The jury was instructed that "the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money" (A. 1116).

All of the things which the Court instructed the jury to consider in convicting the defendants, save the issue

of involuntariness, were clearly intended by Congress to be permissible; that is, that political money earmarked could be routinely collected at regular intervals at job sites; routinely collected by union stewards, foremen, area foremen, general foremen, or other agents and officers of the union; determined by a formula based upon the amount of hours or overtime hours worked upon a job under the jurisdiction of the union; at one rate for members and at a different rate for nonmembers; begun, continued and terminated with employment on a job under the jurisdiction of the union by the principal officers of the union; and the record or records used in the collection of the contributions to the Fund may be similar to those employed from time to time by the union in the collection of its regular dues and assessments (A. 1113-15).

These were items, which the Court instructed the jury to consider to determine whether the Fund was in fact monies of the union and a device to evade the law (A. 1113-15). Indeed, it is now clear that political monies need not be kept separate from the union itself, but only in a separate, segregated fund. Congress has now confirmed that that was its original intent in enacting 18 U.S.C. § 610.

Over the government's objections, the Court refused petitioners' requested instructions S, T, Z, AA, BB, VV and YY (Pet. Br. 72-73, note 21), which would have submitted the issue of voluntariness to the jury. Specifically, one of petitioners' requested instructions AA, reads as follows:

> "The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collection of money to be used for making contributions to candidates for political office. The law merely prohibits union dues or assessments from being used for such purposes. Therefore if you

find that contributions made to the Political, Educational, Legislative, Charity and Defense Fund were made by members of Local 562 voluntarily and did not constitute the payment of union dues or assessments you must find the defendants not quilty" (A. 1097-98).

See the other requested instructions contained in Pet. Br. 72-73, note 21. (A. 1097-1100).

In light of the recent enactment of § 205 which clarifies Congress' original intent in passing 18 U.S.C. § 610, the refusal of the trial court to give any of petitioners' requested instructions is plain reversible error. Indeed, even the Government now seemingly concedes that issue. See, Gov. Br. 30-31.

In passing, we also note that the enactment of § 205 of the Federal Election Campaign Act of 1971 points up that 18 U.S.C. § 610 was so vague, uncertain and indefinite that Congress had to enact new legislation in order to clarify it.

CONCLUSION

For the foregoing reasons, in addition to those stated in petitioners' original brief, it is respectfully submitted that the convictions should be reversed.

Respectfully submitted

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